IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; REBECCA BUSK-SUTTON; and JENNIFER LUDOLPH, *Plaintiffs*, v. NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency, *Defendants*, and ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE, *Defendant-Intervenors.*	No. 2:17-CV-13080-PDB-EAS HON. PAUL D. BORMAN MAG. ELIZABETH A. STAFFORD **DEFENDANT-INTERVENORS' PROPOSED MOTION TO DISMISS** ORAL ARGUMENT REQUESTED

Defendant-Intervenors St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore move this Court under Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the Complaint, for the reasons below and explained more fully in the attached Brief.

1. Plaintiffs lack standing as they have failed to demonstrate a legally cognizable injury that is redressable by a decision in their favor. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). No one is preventing Plaintiffs from adopting or fostering children if they want to. Plaintiffs do not have a constitutional right to be licensed specifically through St. Vincent rather than any other adoption agency. And even if they did, the relief Plaintiffs seek would result in St. Vincent closing its programs to everyone, and Plaintiffs would *still* be unable to work with St. Vincent.

2. Plaintiffs' Establishment Clause claim fails under the historical test required by *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). Adoption agencies have long been free to ensure placements are consistent with their religious beliefs. Governments do not establish religion when they accommodate religious practices or contract with religious organizations to provide social services. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

3. For similar reasons, Plaintiffs have failed to state an Equal Protection claim. The State has made no suspect classification or favored any particular religious group, so rational basis applies. *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006). If anything, Equal Protection concerns in this case

weigh heavily against the policy Plaintiffs seek, as it would result in a devastating disproportionate impact on a minority racial groups.

4. Furthermore, the Court cannot constitutionally grant the relief Plaintiffs request because it would violate the First Amendment. The Free Exercise Clause prohibits states targeting religious activity or excluding religious organizations from a public benefit. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). And under Free Speech doctrine, government may not compel organizations to adopt the government's view on an issue as a condition of receiving government funding. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc*., 570 U.S. 205, 133 S. Ct. 2321, 2330 (2013). Here, Plaintiffs want the State to force Defendant-Intervenors to recommend couples against their religious beliefs.

4. Pursuant to Local Rule 7.1(a), on the morning of December 18, 2017, counsel for Defendant-Intervenors contacted Plaintiffs' and Defendants' counsel to determine if they would concur in the relief sought, explaining the nature of and basis for the motion and offering to confer. Defendants' counsel said they "concur in [Intervenor-Defendants'] request." Plaintiffs' counsel said they were unable to provide a response today.

Dated: December 18, 2017

Respectfully submitted,

/s/ Stephanie H. Barclay

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the above document with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

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Plaintiffs,

v.

NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Defendant-Intervenors.

No. 2:17-CV-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

DEFENDANT-INTERVENORS' BRIEF IN SUPPORT OF PROPOSED MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Defendant-Intervenors incorporate by reference Defendants' first issue presented.

2. Defendant-Intervenors incorporate by reference Defendants' second issue presented.

3. Whether Plaintiffs have stated a claim under the Establishment Clause when there is a rich history of our country protecting the work of religious adoption agencies and protecting important partnership between government and faith-based charities.

4. Defendant-Intervenors incorporate by reference Defendants' fourth issue presented.

5. Whether Plaintiffs' requested relief would result in religious discrimination against Defendant-Intervenors in violation of the Free Exercise Clause.

6. Whether Plaintiffs' requested relief would result in content-based compelled speech contrary to the First Amendment.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Hein v. Freedom From Religion Foundation, 551 U.S. 587, 607 (2007); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

INTRODUCTION

Plaintiffs' claims must be dismissed, both because they would turn the First Amendment on its head—forcing the State to engage in religious discrimination and free speech violations—and because Plaintiffs have suffered no injury traceable to Defendants' conduct or redressable by this Court.

Michigan adoption agencies refer families to other agencies for a wide variety of reasons, from personality conflicts to convenience of location. Plaintiffs' lawsuit challenges just one type of referral: a referral for religious reasons. But allowing this longstanding and historic practice to continue does not violate the Constitution. In fact, Michigan would violate the Free Exercise Clause if it tried to eliminate religious referrals in the way Plaintiffs seek. And it would violate the Free Speech Clause if it tried to force religious agencies to make a policy change regarding written referrals as a condition of partnering with the State.

This court need not reach those constitutional issues because Plaintiffs have a more fundamental problem: they have suffered no legally cognizable injury sufficient for standing. Neither Defendants nor St. Vincent is stopping Plaintiffs from adopting if they want to. Consistent with state law, St. Vincent refers unmarried and same-sex couples who wish to be licensed to other capable adoption agencies, just as other agencies frequently refer families elsewhere for many secular reasons.

In fact, the named Plaintiff couples in this case live much closer to multiple other adoption agencies. They had to go out of their way to target St. Vincent. But that targeting cannot create a constitutional right to the licensing services of a particular religious non-profit. And Plaintiffs' suit—which asks this court to drive St. Vincent from the adoption field completely—would not give Plaintiffs the services they supposedly seek anyway.

St. Vincent did not and does not prevent other agencies from placing children with Plaintiffs or other same-sex couples. And St. Vincent cares for children who need homes, regardless of sexual orientation. Once licensed, Plaintiffs are not restricted to children in the care of their chosen licensing agency, and they could be matched with children in St. Vincent's care. Thus, allowing agencies like St. Vincent to continue their work does nothing to take away LGBT rights or prevent same-sex couples from adopting.

But Plaintiffs' failure to demonstrate injury does not mean that no one here faces harm. In fact, the children of Michigan would face significant and irreversible harm if Plaintiffs succeed in this lawsuit. As the ACLU has recognized, Michigan has 13,000 children in the foster care system and "it doesn't have enough families willing and able to meet their needs. . . . Some children wait years for an adoptive

family and some age out of foster care without ever becoming part of a family."[1] Plaintiffs may think it wise to exacerbate this problem by shutting down religious adoption agencies and reducing the pool of adoptive families, but the Constitution does not require—and in fact forbids—that harmful and misguided approach.

Ultimately, Plaintiffs' lawsuit reveals itself as one that is not at all about protecting children. It is about scoring cheap political points at the expense of children. For the reasons set forth herein, and for those set forth by the State, this Court should dismiss this meritless lawsuit and reject the invitation to cause further and needless harm to children who have already suffered enough.

BACKGROUND

Defendant-Intervenors incorporate by reference the facts as set forth in Defendant-Intervenors' Memorandum in support of their Motion to Intervene. *See* Dkt. 18 at 2-14.

LEGAL STANDARDS

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), courts must consider whether the "complaint . . . contain[s] sufficient

[1] Leslie Cooper, Same-Sex Couples Are Being Turned Away From Becoming Foster and Adoptive Parents in Michigan. So We're Suing, ACLU, (Sept. 20, 2017) https://www.aclu.org/blog/lgbt-rights/lgbt-parenting/same-sex-couples-are-being-turned-away-becoming-foster-and-adoptive.

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard of review requires more than the bare assertion of legal conclusions. *Twombly*, 550 U.S. at 555 (citing Fed. R. Civ. P. 8(a)). Courts "need not accept as true legal conclusions or unwarranted factual inferences." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (quoting *Gregory v. Shelby Cty.*, 220 F.3d 433, 446 (6th Cir. 2000)).

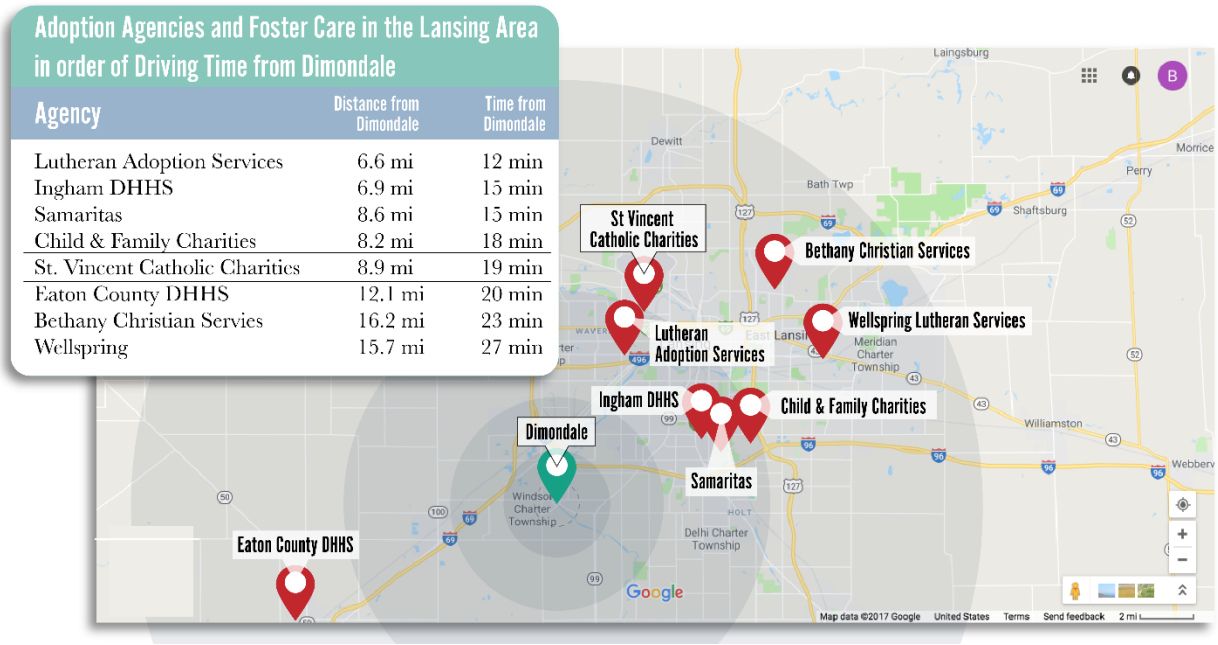
ARGUMENT

I. Plaintiffs have not demonstrated an injury that is cognizable for standing or redressable by this court.

To establish standing, Plaintiffs bear the burden of showing an injury in fact caused by Defendants' conduct and likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs have not demonstrated any injury that gives rise to standing, and the outcome they seek would not redress any alleged harm. Their claims must be dismissed.

Plaintiffs can show neither injury nor causation nor redressability. St. Vincent does not stop Plaintiffs or other couples from adopting children. *See* Dkt. 18 at 10. Nor do the Defendants. The four Plaintiffs who claim they want to adopt children from foster care remain free to do this with the many other agencies in Michigan. *Id.* ¶ 9. For example, Kristy and Dana Dumont chose to call St. Vincent, but they could

easily have sought licensing with an agency closer to their house. *See* Dkt. 18 Ex. 1 ¶ 8, Attach A.



Once licensed, Plaintiffs are not restricted to children in the care of their chosen licensing agency, and they could be matched with children in St. Vincent's care. *Id.* ¶ 10. Neither St. Vincent nor Defendants has injured Plaintiffs at all.

Finally, forcing St. Vincent to end its services would do nothing to redress their alleged injury. Plaintiffs do not have a constitutional right to be licensed specifically through St. Vincent rather than any other adoption agency. And even if they did, the relief Plaintiffs seek would result in St. Vincent closing its adoption and foster programs to everyone, and Plaintiffs would *still* be unable to receive their license through St. Vincent. *See Id.* ¶ 13. Plaintiffs have not even attempted to explain why

the many alternative adoption agencies in the State are insufficient for their needs. *See Id.* ¶ 9, Attach B.

Nor could Plaintiffs establish "taxpayer standing." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011). "[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court." *Id.* The only exception is where a taxpayer specifically challenges "exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution." *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). It is not sufficient to allege "an incidental expenditure . . . in the administration of an essentially regulatory statute." *Id.* Nor is there taxpayer standing to challenge "expenditures resulted from executive discretion." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 605 (2007). Here, the State has not allocated any specific funds to any program Plaintiffs challenge, and any spending is the result of executive discretion. Thus, Plaintiffs' claims are not justiciable.

II. Plaintiffs' constitutional claims lack merit.

A. Allowing faith-based agencies to refer couples does not violate the Establishment Clause.

Plaintiffs' Establishment Clause argument cannot be squared with Supreme Court precedent or the extensive history of religious involvement with adoption. Furthermore, Plaintiffs' overbroad reading of the Establishment Clause would

invalidate a host of state and federal laws providing religious protections and allowing government to partner with religious organizations to serve the neediest members of society.

1. History of Religious Adoption. Defendants rely on the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See* Dkt. 16 at 16. Plaintiffs' claims would fail under *Lemon*, but that test has been superseded by *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), in which the Supreme Court made clear that the proper analysis looks to the historical purposes of the Establishment Clause. "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)) (emphasis added). The Court started from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting what that means to courts today. *Id.* The historical understanding of "establishments" in some cases requires broad exemptions for religious employers, even in the context of anti-discrimination laws. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 181-87 (2012).

In this case, the historical record supports granting private organizations a large measure of autonomy in helping connect children with adoptive homes. The

adoption and foster care system was largely developed by private, mostly religious, organizations such as orphanages which were tasked with taking care of children without parents. E. Wayne Carp, Adoption in America: Historical Perspective 3-4 (2002). State adoption laws were largely meant to facilitate the work of private charitable institutions. *Id.* at 5. In the late 19th century, minority religious groups such as Catholics increasingly established societies to facilitate adoptions precisely so that children could be adopted by families that shared the faith. *Id.* at 7; Paula E. Pfeffer, *A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago*, 1833-1933 in E. Wayne Carp, Adoption in America: Historical Perspective 103-105 (2002) (discussing how Catholic adoption agencies in Chicago were founded to prevent Catholic children from being taken away from Catholic homes). And these organizations frequently received government funding to facilitate those adoptions. Carp, *supra* at 4. State laws guaranteed "religious protection" by allowing, and in some instances requiring, religious organizations to make placements consistent with the religious beliefs of the religious adoption agency. Ellen Herman, Kinship by Design: A History of Adoption in the Modern United States 60, 125 (2008).

Through referrals between adoption agencies, or religion matching laws, children were routinely placed with families of the same faith. Barbara Melosh, Strangers and

Kin: The American Way of Adoption (2002) (describing how religious organizations referred adoptive parents to each other based on the parents' religious beliefs). Agencies were free to require prospective parents to meet faith-based requirements of belief and conduct. *Id.* 83-84 (describing how a Catholic adoption agency in Delaware imposed such standards). The historical record therefore affirms that the Michigan law is wholly consistent with our nation's long history of allowing religious adoption agencies to place children consistent with their religious beliefs and mission. That history alone is sufficient to uphold the Michigan law under the Establishment Clause.

2. Government Partnership with Private Organizations. Even under *Lemon*, the Establishment Clause could not prohibit the government from partnering with private religious organizations to serve the needy. Plaintiffs' argument to the contrary proves too much. Dkt. 1 at 4. Taken to its logical extreme, Plaintiffs' reading would bar the Government from partnering with any religious organizations at all, even religious hospitals providing medical care for the poor through Medicaid.

The Establishment Clause does not prohibit government contracts with religious organizations for the provision of social services. In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court upheld the constitutionality of a government program that partnered with organizations "that were affiliated with religious denominations

and that had corporate requirements that the organizations abide by religious doctrines" to provide publicly funded social services to combat teen pregnancy. *Id.* at 599. And it did so even though the law "*expressly contemplated* that some of those moneys might go to projects involving religious groups." *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 607 (2007) (emphasis added).

The Supreme Court emphasized that Congress was entitled to recognize the valuable role that religious organizations play in addressing social problems, and to allow such organizations access to federal funding on an equal basis with secular organizations. *Bowen*, 487 U.S. at 606-608. Fatally to Plaintiffs' case, the Supreme Court rejected the claim "that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs," *id.* at 608, and emphasized that a "symbolic link" between the government and the religious organization did not constitute an establishment of religion. *Id.* at 613.

The Supreme Court has also already upheld the government's ability to accommodate religious organizations like St. Vincent, consistent with the Establishment Clause. In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Supreme Court considered and unanimously rejected an Establishment Clause challenge to an exemption to the Civil Rights Act which allowed religious employers to hire and fire employees on

the basis of religion. The Court noted that it had "long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* at 334 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)). And in *Hosanna-Tabor*, the Supreme Court held that the Establishment Clause actually *required* accommodating a religious organization from anti-discrimination laws. 565 U.S. 171.

Furthermore, the Establishment Clause only applies against state actors, and this Court has already rejected the claim that St. Vincent and other adoption agencies qualify as state actors. In *Brent v. Wayne County Department of Human Services*, this Court held that several foster care agencies were not state actors. *Brent v. Wayne Cty. Dep't of Human Servs.*, No. 11-10724, 2012 WL 12877988, at *11 (E.D. Mich. Nov. 15, 2012), *aff'd in part, rev'd in part on other grounds sub nom. Brent v. Wenk*, 555 F. App'x 519 (6th Cir. 2014). The Court thoroughly analyzed the state actor claims under the "three tests" recognized by the Sixth Circuit: "(1) the public function test; (2) the state compulsion test; and (3) the nexus test." *Id.* The Court concluded that, although there was a "co-dependent" relationship between the agencies and the State, none of them "were so controlled by or intertwined with the State that their actions and decisions can be deemed to be those of the State under

the relevant tests and precedent." *Id.* at *13*; see also Molnar v. Care House*, 574 F. Supp. 2d 772 (E.D. Mich. Sept. 5, 2008) (private non-profit agency to which governmental entity referred minor child was not a state actor). Since organizations like St. Vincent are not state actors, their religious exercise cannot violate the Establishment Clause.

B. Allowing faith-based agencies to refer couples does not violate the Equal Protection Clause.

In *Amos*, the Supreme Court rejected the claim that giving accommodation to religious organizations violated the Equal Protection Clause. The Court emphasized that laws "affording a uniform benefit to *all* religions" would be analyzed under rational basis review so long as they satisfied the Establishment Clause. *Amos*, 483 U.S. at 339. Here, the State has made no suspect classification, and there is no claim that the State has favored any particular religious group, so rational basis applies. *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260-61 (6th Cir. 2006).

As discussed below, the State's interest in protecting referrals for religious reasons on the same basis as referrals for secular reasons is not only rational, it is required by the First Amendment. *See* Part III. And for the same reasons St. Vincent is not a state actor for Establishment Clause purposes, St. Vincent is also not a state actor for Equal Protection purposes. In fact, if all adoption agencies were state actors, that could prohibit the important work of some agencies who specialize in placing

children with Native American families,[2] or in finding homes for black children.[3]

If anything, Equal Protection concerns in this case weigh heavily against the policy Plaintiffs seek, as it would result in a devastating disproportionate impact on minority racial groups. Only 21 percent of Michigan children are from black or mixed-race backgrounds,[4] but 42 percent of children in foster care are black and mixed race.[5] The majority of children currently in St. Vincent's care are of African

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[2] Sault Ste. Marie Tribe of Chippewa Indians, *Child Placement*, https://www.saulttribe.com/membership-services/acfs/child-placement (last visited Dec. 15, 2017) ("The Sault Tribe Binogii Placement Agency is our tribal child placement agency. The agency is licensed by the state of Michigan to provide foster care and adoption services to children ages 0-19 who reside within the tribe's seven-county service area. The agency services children who are enrolled or eligible for enrollment as Sault Ste. Marie Tribe of Chippewa Indians members and Sault Tribe households.").

[3] Michigan Adoption Resource Exchange, *Find a Licensed Agency*, http://mare.org/For-Families/New-to-Adoption/Find-a-Licensed-Agency (listing Homes for Black Children) (last visited Dec. 15, 2017); AdoptUSKids, *Minority Specializing Agency and Resource Directory*, 4, https://www.adoptuskids.org/_assets/files/NRCRRFAP/resources/minority-specializing-agency-directory.pdf (discussing how Homes for Black Children focused on the "adoptive placement of black children").

[4] The Kids Count Data Center: Child population by race, The Anne E. Casey Foundation (2017) http://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=1&loct=2#detailed/2/24/false/870,573,869,36,868/68,69,67,12,70,66,71,72/423,424

[5] The Kids Count Data Center: Children in foster care by race and Hispanic origin, The Anne E. Casey Foundation (2017) http://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin?loc=1&loct=2#detailed/2/24/false/573,869,36,868,867/2638,2601,2600,2598,2603,2597,2602,1353/12992,12993

American, Hispanic, or Native American descent. Dkt. 18 Ex. 1 ¶ 3. The majority of youth who age out of foster care without a permanent family are African American, and a recent study showed that these youth are particularly vulnerable to ending up in poverty, without an education, and back on the streets.[6] Thus, if the State prevents more families willing to adopt and foster by closing St. Vincent's programs, this would disproportionately impact minority children. Such a result requires "careful consideration" and skepticism by this court. *United States v. Blewett*, 746 F.3d 647, 667 (6th Cir. 2013) (Moore J, concurring). Plaintiffs offer no reason for this Court to impose that disparate burden.

III. Plaintiffs seek relief that would violate the First Amendment.

A. Discriminating against religious agencies violates the Free Exercise Clause.

Plaintiffs' requested relief would violate the Free Exercise Clause on three independent grounds: it would (1) explicitly target religious activity, (2) selectively enforce prohibitions against activity for religious purposes while allowing it for secular purposes, and (3) exclude religious groups from a generally available public benefit program.

1. Explicit Targeting. In *Church of the Lukumi Babalu Aye, Inc. v. City of*

[6] Erick Eckholm, *Offering Help for Former Foster Care Youths*, The New York Times (Jan. 27, 2007), http://www.nytimes.com/2007/01/27/us/27foster.html.

Hialeah, 508 U.S. 520 (1993), a Santeria priest challenged four municipal ordinances that restricted the killing of animals. In a 9–0 decision, the Supreme Court struck down the ordinances. The ordinance was problematic for multiple reasons, one of which was that it targeted religious conduct "on its face." *Id.* at 532. Thus, the ordinance violated the "minimum requirement of neutrality." *Id.*

Similarly here, under the legal scheme Plaintiffs seek, an adoption agency would be barred from partnering with the State if it ever referred couples elsewhere based on "religious criteria." Dkt. 1 at 21-22 (asking this Court to enjoin the State "from contracting with or providing taxpayer funding to private child placing agencies that . . . employ religious criteria in decisions regarding the screening of prospective foster and adoptive parents"). If the State adopted (or this Court ordered) that kind of policy, explicitly prohibiting "religious" decision-making, that would be direct religious targeting clearly prohibited by the Free Exercise Clause. Such a policy would be "enacted 'because of', not merely 'in spite of,' [its] suppression of [religious conduct]." *Lukumi*, 506 U.S. at 540 (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

2. Selective Enforcement. Under the Free Exercise Clause, government may not "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. This rule "protect[s] religious observers against

unequal treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (citation and internal quotation marks omitted). In *Lukumi*, the ordinances were not "neutral" because they accomplished a "religious gerrymander"—that is, they burdened "Santeria adherents but almost no others." 508 U.S. at 535-38. And the ordinances were not "generally applicable" because they were substantially "underinclusive"—that is, they failed to prohibit nonreligious killing "that endanger[ed] [the government's] interests in a similar or greater degree" than Santeria sacrifice did. *Id.* at 543-44. In this vein, courts have struck down laws that had only narrow exemptions for secular conduct,[7] laws that provided only occasional individualized exemptions,[8] laws that were not enforced uniformly,[9] and laws that had a combination of exemptions and administrative insensitivity toward religious conduct.[10]

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[7] *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (prohibition on steel wheels was not generally applicable where it exempted school buses, but not Mennonite tractors).

[8] *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (wildlife permitting fee was not generally applicable where it exempted zoos and circuses, but not Native Americans).

[9] *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166-67 (3d Cir. 2002) (a local ordinance broadly banned the placement of any signs or other materials on any public utility poles but the government only enforced this prohibition against Orthodox Jews)

[10] *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. Apr. 5, 1996) (exemptions allowed "in a broad range of circumstances not enumerated in the rule").

Here, the result Plaintiffs seek would require an inappropriately selective—and anti-religion—prohibition on agency referrals. Right now an adoption agency *can* refer a couple or individual to another agency for a myriad of other reasons, including the following: (1) the family may live further away than the agency would like to drive for home visits, so they refer them to a closer agency, (2) the agency already has a waiting list, (3) the family has not been satisfied with the agency's services, and (4) the family is looking for a specific type of child not currently in that agency's care. Dkt. 18 Ex. 1 ¶ 14. Some agencies even specialize in placing children with Native American families,[11] or in finding homes for black children.[12] Allowing referrals for these secular reasons—but not for religious reasons—would create a double standard impermissibly "singl[ing] out the religious for disfavored treatment." *Trinity Lutheran*, 137 S. Ct. at 2020-2021. That is forbidden by the Free Exercise Clause.

3. Exclusion from a Public Benefit. In *Trinity Lutheran*, the Supreme Court affirmed that a religious organization could not be excluded from a government benefit program because it is religious. 137 S. Ct. at 2019. In a 7-2 opinion, the Supreme Court held that this "exclusion of [a religious organization] from a public

[11] *See supra* n.2.
[12] *See supra* n.3.

benefit for which it is otherwise qualified . . . is odious to our Constitution . . . and cannot stand." *Id.* at 2025. States cannot exclude organizations because they are religious, nor can they exclude organizations because they act religiously. *Id*. at 2026 (Gorsuch, J., concurring in part and concurring in judgment: "I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.").

Here, the relief Plaintiffs seek would exclude St. Vincent and similarly situated agencies from a publicly available benefit for which they are otherwise qualified—the ability to partner with the State in offering adoption and foster services to families and vulnerable children—entirely because their actions are based on religious principles.

Excluding St. Vincent because of its religious actions would hurt both St. Vincent and Michigan children. St. Vincent would be barred from helping foster children and adoptees if it loses its contract with the State. Dkt. 18 Ex. 1 ¶ 13. To be sure, St. Vincent is not in this for the money—it loses more money than it makes when providing foster services. *Id.* But losing this contract would require St. Vincent to close down this program, and it would have severe additional financial impacts on other services St. Vincent offers as well. *Id.*

Plaintiffs argue that St. Vincent is not prohibited from exercising its religion. But

the Free Exercise Clause also "protects against indirect coercion or penalties on the free exercise of religion" such as "the denial of or placing of conditions upon a benefit or privilege." *Trinity Lutheran*, 137 S. Ct. at 2022 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), and *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)) (internal quotation marks omitted). Here, if the government were to ban religious referrals, St. Vincent would have to choose between participating in the program or remaining true to its mission as a religious institution. *See* Dkt. 18 Ex. 1 ¶ 7.

4. Strict Scrutiny. Laws that target the religious for special disabilities are "subject[] to the strictest scrutiny" and "can be justified only by a state interest 'of the highest order.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (citing *Lukumi*, 508 U.S. at 533 and *McDaniel v. Paty*, 435 U. S. 618, 628 (1978)). But Plaintiffs cannot show that any compelling interest would be furthered through the religious discrimination they advocate. In fact, to the extent Plaintiffs seek to be licensed by St. Vincent, their requested relief—which would force St. Vincent to stop licensing altogether—would not even achieve that goal. By contrast, Michigan has a strong interest in ensuring children and families receive quality care and services. Its continued collaboration with St. Vincent, an agency that has recruited more families than seven of the eight agencies in its service area, furthers the government's interest in finding

families for children.

Protecting the Free Exercise rights of St. Vincent does nothing to prohibit same-sex couples from fostering or adopting children. As described above, the Plaintiffs live closer to a number of other adoption agencies than the faith-based agencies they sought out to name in their Complaint. Dkt. 18 Ex. 1 ¶¶ 8-9. The Dumont Plaintiffs, for example, bypassed four adoption agencies that were closer to them in order to target St. Vincent. *Id.* ¶ 8.

Nor does St. Vincent do anything to prevent children in its care from being placed by another agency with a same-sex couple. *Id.* ¶ 10. Families working with other adoption agencies are not restricted to children in the care of their chosen licensing agency, and any family could be matched with children in St. Vincent's care through the Michigan Adoption Resource Exchange. Dkt. 18 at 10.

In sum, protecting the Free Exercise rights of St. Vincent will do nothing to prevent unmarried or same-sex couples from becoming adoptive or foster parents. And driving St. Vincent out of the adoption and foster market will do nothing to help more same-sex couples become adoptive or foster parents. But driving St. Vincent out of the market *will* leave a gaping void that results in fewer families recruited, fewer services offered to families like the Bucks with special needs children, and fewer individuals like Shamber who are able to find a permanent and loving home.

In *Trinity Lutheran*, the consequence of religious discrimination was a few more scraped knees. Here, the consequences of religious discrimination are far more serious. Plaintiffs can provide no justification for such a result, and certainly not a compelling one.

B. Requiring agencies to recommend couples against their religious beliefs would unconstitutionally compel speech.

Government may not compel content-based speech as a condition of receiving government funding. In *Agency for International Development*, the court was faced with a government program to combat HIV/AIDS which permitted funding only to organizations which "explicitly agree with the Government's policy to oppose prostitution and sex trafficking." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc*., 570 U.S. 205 (2013). The court struck down the requirement, holding that "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id*. at 2330 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)). Because the requirement was not limited to restricting the activities funded, but compelled recipients "to pledge allegiance to the Government's policy," it could not stand. *Id*. at 2332. The Court affirmed the "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Id.* at 2327 (citation and quotation omitted).

Here, if Plaintiffs' lawsuit succeeded, St. Vincent would be compelled to speak in two ways. First, as a pre-condition to partnering with the State, St. Vincent would have to adopt a policy to cease making religiously motivated referrals. This is precisely the sort of "pledge allegiance to the Government's policy" as a condition of partnership that the First Amendment prohibits. *Id*. at 2332. Second, to add insult to injury, the service such a policy would require is that St. Vincent provide the State with *written assessments* that conflict with St. Vincent's religious beliefs. Like other adoption agencies, St. Vincent does not have authority to make any final determinations regarding the placement of children in homes for purposes of adoption or foster care. Dkt. 18 Ex. 1 ¶ 6. Instead, the agency's responsibility simply includes providing written evaluations and recommendations to the State regarding foster licensing and approval of adoption for families.[13] The ultimate determination about placement of children and licensing of families for foster and adoptive purposes is made by DHHS. Thus, in order to carry out their work in finding homes for children, agencies must tell DHHS in writing whether they endorse a home.

[13] Mich. Admin. Code R 400.12325 ("An agency shall recommend to the department the appropriate licensing action consistent with facts contained in the foster home evaluation and any special evaluations."); Mich. Admin. Code R 400.12605 ("An agency social service worker shall complete a written adoptive evaluation within 90 days of the family signing an adoption application and prior to approving a family for adoption."); Mich. Admin. Code R 400.12607 ("An agency shall recommend the appropriate action consistent with the facts contained in the adoptive evaluation.").

St. Vincent cannot provide written recommendations and endorsements of unmarried or same-sex couples, consistent with its Catholic mission. Dkt. 18 Ex. 1 ¶ 7. Nor does St. Vincent want to send the State written recommendations that all unmarried or same-sex couples who come to it are *unsuitable* for adoption. *Id.* Rather, on this sensitive and important issue, St. Vincent would simply rather stand aside, and allow other qualified agencies to make recommendations on behalf of unmarried or same-sex couples. *Id.* Furthermore, it is difficult to believe that the Plaintiffs actually want to have their evaluations performed by an organization with religious objections; one would think the preference would be to *not* be evaluated by St. Vincent in that circumstance.

Plaintiffs' lawsuit would essentially prohibit St. Vincent from stepping aside and instead force them to speak and "to adopt [the] particular belief," in a written recommendation to the State, inconsistent with their religious beliefs about marriage. *Agency for Int'l Dev*, 133 S. Ct. at 2330. This would clearly contravene "the individual's right to speak his own mind" and instead allow "public authorities to compel him to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress,

disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). For the same reasons Plaintiffs cannot satisfy strict scrutiny under Defendant-Intervenors' Free Exercise defense, it cannot withstand strict scrutiny required under the compelled speech doctrine. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (whether strict scrutiny is triggered by the Free Speech Clause or RFRA, "the consequences are the same"). Thus, First Amendment speech protections require that Plaintiffs' claims be dismissed.

CONCLUSION

For the reasons stated above, this Court should grant Defendant-Intervenors' Motion to Dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

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